No. 87-416

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE

and

NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,

v.

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a nonparty witness is entitled to raise absence of Article III Judicial Power as a defense to compulsory orders issued and enforced against it by a federal court.

2. Whether the district court in this case lacked Article III authority to issue and enforce compulsory process against petitioners in the underlying litigation.

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INTEREST OF AMICI CURIAE

The Christian Legal Society is a nonprofit professional association of 3,500 judges, attorneys, law professors and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect the free exercise of religion, supporting the appropriate accommoda-

tion by the state of religious beliefs and practices and the respect for religious rights as required by the First Amendment, thus strengthening the individual citizen's respect for, and allegiance to, our constitutional government.

The Christian Legal Society's interest in this particular case is two-fold: First, the district court's contempt order seeks through coercive fines to force a major religious body to divulge internal memoranda and documents in litigation to which it is no longer a party. Coerced production of such documents poses a serious potential threat to religious liberty by compromising the autonomy of churches and the privacy of communications among a church's ministers and leaders. Protection of these religious liberty interests requires that nonparty religious groups aggrieved by such exercises of federal judicial authority against them be permitted to challenge the lawfulness of such orders by federal district courts and obtain full appellate review of the merits of such challenges.

Second, the justification advanced by the district court for exercising the Judicial Power of the United States against petitioners is, in our view, predicated on a distortion of the fundamental character of the establishment clause as a co-guarantor (with the free exercise clause) of *religious liberty*. The Center for Law and Religious Freedom has filed briefs on behalf of amici curiae in this Court on previous questions of interpretation of the establishment clause. See, *e.g.*, *Corporation of Presiding Bishop* v. *Amos*, Nos. 86-179 and 86-401 (June 24, 1987); *Karcher* v. *May*, No. 85-1551 (December 1, 1987).

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

STATEMENT OF THE CASE

Amicus Curiae adopts the statement of the case in the Brief for the Petitioners.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents two important questions of federal court jurisdiction under Article III of the Constitution. The first issue is the so-called question of petitioners' "standing" to challenge the Article III jurisdiction of the district court, as a defense to that court's attempted exercise of the coercive power of the federal judiciary against them in the issuance and enforcement of compulsory process. The second issue is whether petitioners are correct in their assertion that the district court was without jurisdiction under Article III, and therefore without power to issue and enforce those orders.

The answer to each question is, we submit, quite plain under this Court's settled precedents. First, petitioners' "standing" to challenge the district court's contempt order on Article III jurisdictional grounds is clear under *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). *Marbury* is, of course, famous for many legal principles. But the fundamental holding of *Marbury* is that federal courts, being courts of a limited jurisdiction prescribed and proscribed by the Constitution itself, may not exercise a jurisdiction conferred or assumed in violation of Article III of the Constitution, so as to compel individuals to take certain actions. In *Marbury*, this Court held that it was without Article III jurisdiction to issue a writ of mandamus directing Secretary of State James Madison to deliver a judicial commission to William Marbury. Madison's "standing" to raise the Constitution defensively, as a shield to the coercive exercise of judicial authority, was not remotely challenged, and indeed was a necessary premise of the Court's decision. Here, petitioners likewise assert that the rendering court lacked

Article III jurisdiction to issue coercive process against them. The Court of Appeals' holding that petitioners lack standing to raise such a challenge is without foundation, and directly contrary to *Marbury*.

Second, petitioners' assertion that the district court lacked jurisdiction is plainly correct under *Allen* v. *Wright*, 468 U.S. 737 (1984) and *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). The underlying litigation was brought by an abortion-rights advocacy organization and certain individuals seeking to compel the United States government to enforce its laws—in particular, restrictions on political activity by tax-exempt organizations—against a third party. That federal courts lack Article III jurisdiction to entertain such suits is clear under a long line of decisions and, most recently, under *Allen* v. *Wright*, *supra*, involving a factual posture nearly identical to the one presented here.

This brief will emphasize two points that are not likely to be addressed by the parties in the same manner as presented here. First, while we do not disagree with petitioners' argument for "standing" to challenge jurisdiction,[1] we believe that *Marbury* v. *Madison*, *supra*, offers an equally clear and altogether straightforward ground for the same basic conclusion. Second, petitioners' attack on the district court's jurisdiction cannot be distinguished from *Allen* v. *Wright*, *supra*, on the grounds that the underlying lawsuit here asserts an establishment clause rather than an equal protection type

[1] Petitioners argue that the contempt order is fully appealable, and that a federal appellate court has the affirmative obligation to satisfy itself of its own Article III jurisdiction and that of court below (*Bender* v. *Williamsport Area School District*, 106 S.Ct. 3626 (1986)); therefore, petitioners necessarily have standing on appeal to challenge absence of jurisdiction in the district court. *See* Petition for Certiorari at 12-13.

of injury. The district court erred in finding a generalized "establishment clause standing" for some plaintiffs-respondents. See generally *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Nor is there any genuine nexus between plaintiffs-respondents' status as taxpayers, asserting any injury *qua* taxpayers (as distinct from an injury related to participation in the political process), and any right thought to be conferred by the establishment clause. Plaintiffs-respondents allege no judicially-cognizable burden on their freedom from government-compelled participation in, or exercise of, religion; they therefore lack standing under the establishment clause to invoke the jurisdiction of the federal courts.

It is perhaps superfluous to note that these questions, while procedural in form, have enormous substantive consequences for fundamental liberties: The compulsory production of a Church's internal memoranda and documents raises substantial constitutional questions of First Amendment privacy, freedom of association, and the free exercise of religion. *See NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979); *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 697 (1976). Moreover, in denying "standing" to challenge the district court's Article III jurisdiction, the Court of Appeals deprived petitioners of the basic legal right of all citizens to interpose the Constitution *defensively*, as a shield against exercises of coercive governmental power directed against them that are not sanctioned by the Constitution. Finally, the stakes here are quite high: the district court has imposed a $100,000.00 a day contempt fine against a church for refusing to produce church documents in a lawsuit which petitioners fervently (and, in our view, correctly) maintain was lawless from its inception. Such a dramatic abuse of power by the district court, with potentially crippling effects on religious liberty, must be reversed by this Court.

ARGUMENT

I. PETITIONERS ARE ENTITLED TO RAISE ABSENCE OF ARTICLE III JUDICIAL POWER AS A DEFENSE TO COMPULSORY PROCESS ISSUED AND ENFORCED AGAINST THEM BY A FEDERAL COURT

A. With all due respect to the court below, we do not understand why the panel had such difficulty with the question of petitioners' "standing" to raise the question of absence of Article III jurisdiction in a proceeding to which they have been subjected to the compulsory authority of an Article III court, and are genuinely aggrieved by the order of that court. The issue, we think, is decisively resolved by *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803): An individual is entitled to assert the unconstitutionality of an *ultra vires* exercise of the Article III Judicial Power of the United States in a proceeding where that Power is sought to be employed against him, to his legal detriment. Indeed, a federal court is obliged to notice and resolve such an issue on its own motion.

The facts of *Marbury* are familiar: William Marbury, appointed to a judgeship during the last days of the administration of President John Adams, applied to the Supreme Court for a writ of mandamus directing Secretary of State James Madison [2] to deliver to Marbury his commission as a justice of the peace for Washington County, in the District of Columbia. James Madison was made a party to the case by action of the Court in issuing a rule directing him to show cause why a mandamus should not issue. No cause was shown, and the Court proceeded to rule on the question of whether a mandamus should issue. The Court, speaking through Chief Justice John Marshall, found that Marbury had a legal right to the commission, that mandamus was the appropriate remedy and that the Judiciary Act of 1789 assigned authority to the Supreme Court to issue writs of mandamus both to courts and to "persons holding office[] under the authority of the United States", which category would include the Secretary of State. 5 U.S. (1 Cranch) at 173.

[2] Mr. Charles Lee, the attorney general in the Adams administration and private counsel for Marbury, emphasized in his argument his view that mandamus was *not* directed against President Jefferson or his administration, which had recently succeeded Adams's, but was addressed to the purely ministerial duties of the Secretary of State alone. 5 U.S. (1 Cranch) at 138-141; *id.* at 149. The Court adopted this position. *Id.* at 158. See also *id.* at 166; *id.* at 169-70.

In the famous section of Marshall's opinion explicating the theory of judicial review, the Court held that mandamus to an officer other than a lower court judge was in its essence an exercise of original, rather than appellate jurisdiction, and that Article III of the Constitution forbade Congress to assign such jurisdiction to the Supreme Court outside of the designated classes of cases set forth in Article III. Relying on the nature of a written constitution as a species of law of a higher order than statutory law, the Court held that it could not give effect to Congress's grant of jurisdiction. Having no jurisdiction to issue the writ requested—that is, having no jurisdiction conformable with Article III to order Madison to do some particular act—the Court denied mandamus and discharged the rule directed to Madison.

Marbury is the cornerstone not only of American constitutional adjudication generally, but of this Court's Article III jurisprudence in particular. Two fundamental and related principles of *Marbury* are directly applicable to the instant case.

First, absence of Article III jurisdiction is an absolute bar to exercise of federal judicial power on persons brought before the court. This principle has direct application to the merits of petitioners' claim that the district court lacked jurisdiction to issue and enforce com-

pulsory process against them, as we will discuss in Part II of our brief. *Infra*, at 12-23.

Second, and applicable to the "standing" question, *Marbury necessarily held*, albeit implicitly, that a person subjected to such compulsory federal judicial process has "standing" to challenge its application to him on the grounds that the exercise of such authority exceeds that provided for by Article III of the Constitution. If the issue was not explicitly addressed by the Court, it was only because the proposition was so self-evidently a corollary of the Court's resolution of the case on grounds of absence of Article III Judicial Power to compel Madison to deliver the commission. The holding and logic of *Marbury* necessarily requires the conclusion that Madison had "standing" to raise the argument that the Court lacked Article III jurisdiction to issue the requested order against him. Indeed, under *Marbury*, Madison's "standing" is essentially a non-issue. The Court's holding in *Marbury* is the source of the rule announced in more recent cases, that Article III limitations, being jurisdictional in nature, may be raised *sua sponte* by the Court. As this Court stated in *Bender* v. *Williamsport Area School District*, 106 S.Ct. 1326 (1986):

> Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. See, *e.g.*, *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 173-180, 2 L.Ed. 60 (1803). For that reason, every federal appellate court has a special obligation to "satisfy itself not only if its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. *Mitchell* v. *Maures*, 293 U.S. 237, 244 (1934). See *Justice* v. *Vail*, 430 U.S. 327, 331-332 (1977) (standing). *Id.* at 1331.[3]

[3] Petitioners rely on *Bender*, arguing that, so long as they are entitled to appeal the order in question (*see generally Karcher* v. *May*, No. 85-1551 (Dec. 1, 1987) at 4), as they plainly are with respect to the contempt order in question, the reviewing court is obliged to pass on the question of the issuing court's Article III jurisdiction to issue the order. Petitioners' conclusion follows logically from *Bender* and, indeed, in our view, from *Marbury* itself.

Article III is not an *affirmative defense* against otherwise lawful exercise of the Judicial Power by federal courts; it is a *constitutional prerequisite* to the lawful exercise of such authority. It would therefore appear to be of no consequence that petitioners are not parties in the underlying litigation, but witnesses.[4] What is of consequence is that petitioners stand in the same relation *to the federal court* and its purported exercise of the Article III Judicial Power as did James Madison in *Marbury*. What was of primary relevance in *Marbury* was not that James Madison was a party to the lawsuit, but that he stood in a direct and adversary relation to the exercise of mandamus authority by the Court. The real dispute in which the question of the Court's Article III jurisdiction was relevant was *between Madison and the Court*. The *de facto* "plaintiff" and therefore the "party" obliged affirmatively to show jurisdiction was the federal court asserting power over the individual at bar—in *Marbury*, the Supreme Court. So here, petitioners are, like Madison, *de facto* defendants in a controversy with a federal court, and are entitled to assert that court's lack of constitutional jurisdiction as a defense to the proceeding.

Even under more familiar contemporary "standing" analysis, petitioners are entitled to challenge the district court's Article III jurisdiction. *Marbury* makes evident that Article III limitations on federal court jurisdiction are not "personal rights" belonging to any particular person, but fundamental restrictions on federal judicial

[4] Petitioners were originally sued as defendants, but were dismissed as parties on the grounds that plaintiffs-respondents had failed to state a claim on which relief could be granted against petitioners. *Abortion Rights Mobilization, Inc.* v. *Regan*, 544 F. Supp. 471, 487 (S.D.N.Y. 1982).

power, invokable by any person wrongfully subjected to such power. It makes absolutely no sense to argue that petitioners are somehow asserting the "rights" of the Internal Revenue Service under Article III.[5] Petitioners plainly are asserting their own interests in freedom from intrusive, coercive discovery. Petitioners are injured in that interest as a direct and immediate consequence of the allegedly unlawful conduct of the district court, and that injury would be redressed by a reversal of the district court's assertion of jurisdiction. See *Diamond* v. *Charles*, 106 S.Ct. 1697, 1707-1708 (1986).[6]

[5] Even were Article III thought to create a legal "right" that in this case "belonged" to the Government, petitioners have standing to assert this right in defense to the imposition of a legal duty on them, that depends for its validity on the lawfulness of a deprivation of this constitutional "right" of another. See *Craig* v. *Boren*, 429 U.S. 190 (1976); L. Tribe, AMERICAN CONSTITUTIONAL LAW (1978), § 3-26, at 104 ("Just as a litigant should always have standing to claim that he is being penalized for asserting his own constitutional rights, a litigant's claim that complying with a duty imposed upon him would prevent another from exercising a constitutional right presents a clearly justiciable issue about the permissibility of the choice government seeks to impose upon the litigant.") (footnotes omitted).

[6] We note for the Court's consideration that petitioners' "stake" here, while in some respects the same as any other witness potentially subjected to annoying, intrusive discovery, extends considerably further: What is at stake for petitioners are matters of religious privacy, institutional autonomy and freedom of association—all of First Amendment dimension. See *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979); *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 697 (1976); *NAACP* v. *Alabama* ex rel. *Patterson*, 357 U.S. 449 (1958). Whatever the validity of the Court of Appeals' concern about "collusion" between a dilatory defendant and a witness, those concerns are plainly inapposite here. Petitioners have a unique stake in challenging the district court's jurisdiction, were served with subpoenas by their *adversaries* in the litigation, and presumably would have followed the same course of action had they remaned parties in the litigation. Surely, petitioners' right to challenge lawless exercise of federal judicial power against them is not *reduced* by the fact that the court could not grant relief

B. The Court of Appeals in this case strayed quite far from first principles of Article III by following instead an unduly broad interpretation of a single case. The Court of Appeals' reliance on (and extension of) *Blair* v. *United States*, 250 U.S. 273 (1919), is perplexing, and quite surely wrong. The panel majority's extension of *Blair* makes sense only on the supposition that *Blair* overruled, or severely limited, *Marbury* v. *Madison*. Nothing in *Blair* remotely suggests such a radical rule.

First, we think it highly doubtful that *Blair* is applicable outside the unique context of grand jury proceedings. While broad language in the *Blair* opinion can be read as suggesting a rule applicable to court and grand jury alike, such language is clearly dictum unnecessary to the holding, and must be considered in light of subsequent holdings of this Court noting different legal standards for the investigative function of a grand jury, and the adjudicative powers of a federal court. As this Court has more recently noted, a grand jury "does not depend on a case or controversy for power to get evidence, but can investigate merely on a suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Powell*, 379 U.S. 48, 57 (1964). Obviously, this is a different rule than governs the power of federal courts.

Second, *Blair* is easily distinguished on the grounds that the witnesses did not challenge the Article III jurisdiction of the district court convening the grand jury, but the absence of subject matter jurisdiction as a result of the alleged unconstitutionality of the federal election laws governing primaries. The distinction is important, for had the witnesses in *Blair* challenged the

against them as parties. And surely, if the right of witnesses to challenge a federal court's Article III jurisdiction is subject to abuse or manipulation, such abuses may legitimately be punished in cases where they arise and are proved. This is not such a case.

Article III jurisdiction of the court they surely should have lost: The court had jurisdiction to decide jurisdiction (see *United States* v. *United Mine Workers*, 330 U.S. 258 (1947)) and thus had constitutional authority under Article III to pass on the constitutionality of the federal election laws in a challenge by a party injured by those laws. Indeed, the Court in *Blair* suggested precisely such a possible limitation on the scope of its holding: "At least, the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction." 250 U.S. at 282-83.

This Court's holding in *Blair* that a witness "is not interested to challenge the jurisdiction of court or grand jury over the subject matter that is under inquiry" (250 U.S. at 279) need be read as nothing more than a statement that the grand jury witnesses in *Blair* neither asserted nor possessed any cognizable interest in the constitutionality of the election laws by virtue of their status as witnesses in a grand jury proceeding lawfully impaneled by a federal court possessing unquestioned Article III jurisdiction. Certainly *Blair* does not vitiate *Marbury*'s holding that Article III jurisdiction is a fundamental prerequisite to exercise of the Judicial Power of the United States against an individual aggrieved by such action.

II. THE DISTRICT COURT LACKED ARTICLE III JURISDICTION TO ISSUE AND ENFORCE PROCESS IN THE UNDERLYING LITIGATION

Up to this point, we have been addressing the ability of persons to invoke the Constitution (specifically, absence of Article III jurisdiction) *defensively*, where they have been made subject to compulsory judicial orders of an Article III court. We turn now to the converse of this proposition. When a litigant seeks to invoke the power of

federal courts, as it were, *offensively*, in order to obtain affirmative judicial relief for alleged deprivations of legal rights under the laws or Constitution of the United States, he must possess Article III "standing" to sue, in order for the court to have jurisdiction. Where the power of federal courts is invoked as a sword, Article III "requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Diamond* v. *Charles*, 106 S.Ct. 1697, 1707-1708 (1986) (collecting cases) (original quotation marks and citations omitted).

The plaintiffs-respondents in this case plainly lack standing—and the district court therefore plainly lacked jurisdiction over their claims—under the holdings of *Allen* v. *Wright*, 468 U.S. 737 (1984) and *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), applying in situations closely analogous to the case at bar this Court's reading of Article III's minimum requirements.[7] The resolution of this question is quite

[7] This is not a case where the district court was lawfully exercising "jurisdiction to decide jurisdiction". A federal court necessarily has jurisdiction to decide questions of its own jurisdiction under Article III, and a federal court does not act without jurisdiction in enforcing process or court orders necessary to permit determination of this threshold issue (and no other). See *United States* v. *United Mine Workers*, 330 U.S. 258, 293 (1947); *cf. Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). The discovery demanded of petitioners here, however, did not go to the issue of respondents' standing to sue the government or the court's jurisdiction, but to the merits of respondents' complaint. With respect, the concurring opinion's attempt to save the rationale of Judge Newman's majority opinion by recasting the case as one involving discovery going to questions of jurisdiction (In re *United States Catholic Conference*, 824 F.2d 156, 166 (2d Cir. 1987) (Kearse, J., concurring)) strikes us as somewhat disingenuous, on the facts of this case. The district court had already finally adjudicated the standing issue on the government's motion to dismiss (*Abortion*

clear, and likely to be thoroughly briefed by petitioners and by the Solicitor General. Accordingly, we do not address all aspects of it here. Rather, we wish briefly to address the district court's rather extraordinary holding —best explained as a strained attempt to distinguish *Allen* and *Simon*—that some of the respondents possess a special "establishment clause standing" to invoke as plaintiffs the power of federal courts. This argument must be rejected, for two reasons: First, there exists no "establishment clause exception" to Article III's limitations on the federal Judicial Power; and second, plaintiffs-respondents allege no legally cognizable injury to any of the particular *personal* interests protected by the establishment clause.

A. There Is No Generalized Establishment Clause Exception To Article III Standing Requirements

The notion of a generalized establishment clause exception to usual Article III standing requirements was rejected by this Court in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). In *Valley Forge*, the Court specifically repudiated a theory of special establishment clause standing that had been articulated by the court of appeals in that case, and that closely resembles the theory propounded by the district court here. This Court noted in *Valley Forge* that "[t]he Court of Appeals in this case ignored unambiguous limitations on taxpayer and citizen standing[]", apparently "out of the conviction that enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege distinct and palpable injury to himself that is likely to be redressed if the requested relief is granted." 454 U.S. at 488 (original quotation marks and citations omitted). This Court found that such a vision of standing had "no merit" (*id.* at 488, n.25), and rested on the philosophy that the Article III "cases and controversies" limitation on the jurisdiction of federal courts is a mere inconvenient nuisance to be disposed of when it becomes a barrier to litigation of interesting constitutional questions. But, as the Court noted, "[t]his philosophy has no place in our constitutional scheme. It does not become more palatable when the underlying merits concern the Establishment Clause." *Id.* at 489. Plaintiffs-respondents' standing cannot be predicated on the bare fact that an establishment clause violation is being alleged, but must involve a more particularized claim of specific *injury* thought to result from such a violation.

Rights Mobilization, Inc. v. *Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982) ("*ARM I*") reaffirmed its original holding on this point, notwithstanding this Court's decision in *Allen* v. *Wright* (*Abortion Rights Mobilization, Inc.* v. *Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985) ("*ARM III*")), twice refused to certify on interlocutory appeal on the jurisdictional issue (*Abortion Rights Mobilization, Inc.* v. *Regan*, 552 F. Supp. 364 (S.D.N.Y. 1982) ("*ARM II*"); see *Abortion Rights Mobilization, Inc.* v. *Baker*, 110 F.R.D. 337, 338 (S.D.N.Y. 1986) (noting second denial of certification)), and was proceeding with discovery as to the merits. See generally 110 F.R.D. at 338-39.

B. Plaintiffs-Respondents Identify No Cognizable Injury Suffered As A Result Of Alleged Unconstitutional Government Action

Like the ideologically-motivated plaintiffs in *Valley Forge*, the clergy plaintiffs and plaintiff-respondent Women's Center for Reproductive Health here have "failed to identify any personal injury suffered by them as a consequence of the alleged constitutional error". *Id.* at 485 (emphasis omitted). The two such conceivable injuries in this case are a "stigmatic" injury of official disapprobation of plaintiffs-respondents' religion (or lack thereof) or a "taxpayer" injury under *Flast* v. *Cohen*, 392 U.S. 83 (1968). Neither allegation is sufficient to create an Article III "case or controversy" on the facts of this case.

The "stigmatic" or "denigration" injury asserted by plaintiffs-respondents here as arising under the establishment clause differs in no material respect from the stig-

matic or denigration injury asserted by the plaintiff class in *Allen* as arising under generalized principles of equal protection.[8] Plaintiffs-respondents' allegation of stigmatic injury here is insufficient to confer Article III jurisdiction for the same reason such allegations were insufficient in *Allen*: generalized, nonspecific claims of stigmatic injury or denigration, suffered in common by all members of a particular class or group of citizens (468 U.S. at 753-54) are insufficient to confer Article III jurisdiction. *Id.* at 754-56. *See also id.* at 751 (prohibition on adjudication of "generalized grievances more appropriately addressed in the representative branches.").

Here, as in *Allen*, the consequences of recognizing respondents' standing on the basis of their allegation of stigmatic or denigration injury "illustrate why [this Court's] cases plainly hold that such injury is not judicially cognizable." 468 U.S. at 755. The Court explained:

> If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school. All such persons could claim the same sort of abstract stigmatic injury respondents assert in their first claim of injury. A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U.S. 669, 687, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973).

[8] The Court in *Allen* assumed, without deciding, that the government conduct in question—alleged unlawful failure to withdraw tax-exempt status from racially discriminatory private schools—was the equivalent of Government discrimination. 468 U.S. at 754, n.20.

> Constitutional limits on the role of the federal courts preclude such a transformation.

Id. at 755-56 (footnote omitted).

There is no reason why these same concerns would not apply to "abstract stigmatic injury" (*id.* at 755) predicated on allegations of religious, rather than racial, disapprobation ostensibly flowing from government action or inaction. Were such an injury cognizable, "standing would extend nationwide" to persons of any religion—or simply any moral viewpoint—to challenge the government's "grant of a tax exemption to [a politically active church], regardless of the location of that [church]." *Id.* at 755-56. An Adventist, Methodist or Atheist in Hawaii could challenge the tax-exempt status of a religious body in Maine with which he has differences of political opinion, transforming federal courts into debating fora for airing the grievances of bystanders. *Cf. id.* at 755-56.

This Court's cases involving Article III limitations in establishment clause lawsuits reflect the same rule as articulated in *Allen*.[9] Indeed, the *Allen* Court relied in part on *Valley Forge* for the rationale quoted above:

[9] *But cf. Walz* v. *Tax Commission*, 397 U.S. 664 (1970) (rejecting on the merits constitutional challenge to state property tax exemption of churches; standing apparently assumed). There is a certain tension between *Walz* and *Allen* v. *Wright*, which we think best explained by a combination of (1) lack of close examination of the potential standing problem in *Walz* (*cf. Allen*, 468 U.S. at 735-36 (distinguishing *Coit* v. *Green*, 404 U.S. 997 (1971), as being of little precedential importance where standing question not explicitly considered in summary affirmance); and (2) the fact that the law of standing has been considerably refined and clarified since *Walz*. *Compare Allen* v. *Wright* (1984) and *Valley Forge* (1982), *with Flast* v. *Cohen*, 392 U.S. 83 (1968). We submit that, were *Walz* to be adjudicated today, it would be appropriately analyzed under the methodology of *Allen*, *Valley Forge* and *Simon*, with the threshold issue of justiciability receiving greater attention.

At all events, *Walz* is distinguishable from the instant case on the ground that the plaintiffs in *Walz* alleged a "taxpayer injury" and

> Were we to recognize standing premised on an 'injury' consisting solely of an alleged violation of a "'personal constitutional right' to a government that does not establish religion," a principled consistency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment, or standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws, to choose but two among as many possible examples as there are commands in the Constitution."

Valley Forge, 454 U.S. at 489-90, n.26; *accord*, *Allen* v. *Wright*, 468 U.S. at 756, n.21 (quoting with approval).

This is not to dispute that "stigmatic" or "denigration" injury is relevant to the substantive determination of an enactment's constitutionality under the establishment clause; on the contrary, such an inquiry plays a central role in the analysis. See *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (relevant question in establishment clause cases whether government communicates message of either endorsement or disapproval of religion); *Wallace* v. *Jaffree*, 472 U.S. 38, 56 n.42 (1985) (citing O'Connor position with approval). But *Valley Forge* makes clear that this injury, to be cognizable by federal courts, must consist of something "other than the psychological consequence presumably produced by observation of conduct with which one disagrees." 454 U.S. at 485. Rather, as in *Allen*, a plaintiff must allege "a stigmatic injury suffered as a direct result of *having personally been denied equal treatment*." *Allen*, 468 U.S. at 755 (emphasis added).

In short, while this Court's establishment clauses cases recognize that whether a given practice communicates a

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plaintiffs-respondents here allege a "political process injury" unrelated to their status as taxpayers. *See infra* at 19-20 & n.10.

generalized message of endorsement or disapproval of some religion (or religion in general) is a highly relevant inquiry *on the merits*, a litigant's *standing* to invoke the jurisdiction of an Article III court *always*—no less in establishment clause cases than in any other kind of case—depends on the existence of some distinct, palpable and remediable injury *personal to him*. *Valley Forge*, 454 U.S. at 489. The classic examples of such personal injuries recognized by this Court's establishment clause decisions are compulsory taxation for allegedly unconstitutional spending programs (*e.g.*, *Flast* v. *Cohen*, 392 U.S. 83 (1968); *cf.*, *e.g.*, *Aguilar* v. *Felton*, 473 U.S. 402 (1985)); and compelled participation in allegedly unconstitutional religious activity or observance (*e.g.*, *Wallace* v. *Jaffree*, 472 U.S. 38; *Abington School District* v. *Schempp*, 372 U.S. 203 (1963); *cf.*, *e.g.*, *Lynch* v. *Donnelly*, 465 U.S. 668 (1984)).

In our view, the first category—taxation for unconstitutional spending—is properly a special case of the second, more general category of *government-compelled participation in religious activity*, which is the essence of an establishment clause violation and the injury that results to individuals from such a violation. Taxpayer standing is recognized in certain establishment clause cases because taxation for unconstitutional spending sometimes can be considered a form of coerced participation in religious activity. We think this the soundest reading of *Flast* v. *Cohen*, 392 U.S. 83 (1968), in light of the Court's subsequent decision in *Valley Forge*. To the extent *Flast* retains any continuing validity, it stands for this somewhat more focused proposition, which in candor must be conceded to be narrower than the formulation of the Court in *Flast* itself.[10]

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[10] We believe this case does not call for a reexamination of *Flast*, since, as explained in the text, plaintiffs-respondents' status *as taxpayers* lacks the requisite nexus required by *Flast* to the nature

Similarly, the inquiry into whether a program challenged under the establishment clause conveys a message of governmental endorsement or disapproval of religion

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of the *injuries* they assert as a consequence of the constitutional infringement alleged (see 392 U.S. at 102)—in this case, a "denigration" or "political distortion" injury, not a taxpayer injury. Indeed, plaintiffs-respondents abandoned early on any reliance on taxpayer standing as a theory distinct from a more general establishment clause standing (*Abortion Rights Mobilization, Inc.* v. *Regan*, 544 F. Supp. 471, 476 n.1 (S.D.N.Y. 1982)), and it should not now be considered as an alternative ground for affirmance. In any event, plaintiffs-respondents are not challenging Congress's action under the taxing and spending power in enacting § 501(c)(3), but rather alleged insufficient enforcement of the terms of that statute *by the Executive Branch*. The challenge is *not* " 'made to an exercise *by Congress* of its power under Art. I, § 8, to spend for the general welfare' ", *Valley Forge*, 454 U.S. at 479 (quoting *Flast*, 392 U.S. at 103 (emphasis added), but rather is made to decisions of the Executive Branch as to investigation and enforcement of the tax laws. See *Allen* v. *Wright*, 468 U.S. at 760; *Valley Forge*, 454 U.S. at 479.

Should the Court deem it appropriate to reconsider *Flast*, however, we would point out that taxpayer standing in establishment clause cases is *unnecessary* in order to provide a vehicle for the vindication of religious liberty through the courts, and actually *distorts* the nature of the religious liberty interests protected by the establishment clause, in the course of litigation of such issues. The allegation of injury that should give rise to standing to sue in establishment clause cases is *official compulsion to participate in some exercise of religion, by imposing a burden on the nonexercise of religion*. As one commentator has noted, "the establishment clause is a safeguard against compelled or induced exercise of religion by means direct and indirect, one of which might in practice prove to be through the pocketbook; but the establishment clause is not a *pocketbook right*." Paulsen, "Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication," 61 Notre Dame L. Rev. 311, 355 (1986) (emphasis in original). We think a good faith claim of injury to *religious freedom* is both a necessary and sufficient condition for the proper adjudication and vindication of establishment clause claims in federal courts; a litigant's status as a taxpayer adds little or nothing to the proper analysis.

recognizes that such messages may exercise a subtle coercive effect on freedom of religious exercise. *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring) (government "endorsement" of a particular religious practice or viewpoint "infringes the religious liberty of the nonadherent" through indirect coerceive pressure upon religious minorities to conform). In any event, coercion in some form or another can be seen as the essence of an establishment clause claim. McConnell, "Coercion: The Lost Element of Establishment", 27 Wm. & Mary L. Rev. 933 (1986). *But cf. Abington School District* v. *Schempp*, 374 U.S. at 233 (dictum). And, in our view, it follows that a *particularized* claim of coercion to participate in religious activity is required for an individual to raise an establishment clause challenge in an Article III court.

Plaintiffs-respondents have made no plausible allegation of any form of religious coercion resulting from government conduct, on the facts of this case. Plaintiffs-respondents are in no way compelled or pressured to participate in state-sponsored religious activity, or to exercise, honor, or support some or any religion other than one of their own choosing. The most charitable reading of plaintiffs-respondents' allegations is that there is indirect coercion in the form of a denial of equal treatment in the political sphere. *Cf. Lynch*, 468 U.S. at 692 (O'Connor, J., concurring); *Heckler* v. *Matthews*, 465 U.S. 728 (1984). But even on such a reading, the most that plaintiffs-respondents claim is a generalized, nonspecific "distortion" of the political process, not that all or any of them have "personally been denied equal treatment" (*Allen*, 468 U.S. at 755 (distinguishing *Heckler* v. *Matthews*)) or been coerced or pressured into exercising a religion or adopting a religious viewpoint other than one of their own choosing, because of the alleged nonenforcement against other exempt organizations of 26 U.S.C. § 501(c)(3) restrictions on political activity.

If the *Flast* rule is regarded as a specialized example of this more general category of government compulsion

in matters of religion, applicable where the alleged coercion of religious activity consists of religious taxation, the lack of merit in plaintiffs-respondents allegations is immediately evident. But even if *Flast* properly identifies a taxpayer injury wholly apart from a claimed infringement of religious liberty, applying *Flast's* "two-stage nexus" test reveals plaintiffs-respondents lack of standing with equal clarity. Simply stated, there is no sufficient logical nexus between plaintiffs-respondents alleged *injury*—"distortion" of the political process—and "the substantive character of the statute or regulation at issue." *Diamond* v. *Charles*, 106 S.Ct. at 1707. See *Flast*, 392 U.S. at 102-03. Surely the tax statute at issue creates no cause of action, express or implied, in favor of these particular clergymen [11] or the Women's Center for Reproductive Health, nor is there generally a right of action for third-parties to challenge or compel executive enforcement of tax laws. *Allen* v. *Wright*, 468 U.S. at 760 (collecting cases); See *Marbury* v. *Madison*, 5 U.S. (1 Cranch) at 169-171 (federal courts lack constitutional power to issue orders to the Executive Branch directing them to take certain actions that are within the *discretionary* discharge of their duties); *Heckler* v. *Chaney*, 470 U.S. 821, 831-32 (1985).[12] More broadly, there is no

[11] The churches of which the clergy plaintiffs-respondents are pastors are tax-exempt under the same statutory provision applied to petitioners (26 U.S.C. § 501(c)(3)). These clergyman are equally free to teach as part of their sincere explanation of religious doctrine a viewpoint on social and moral issues contrary to that held by petitioners as an incident of petitioners' religious convictions. There can be no doubt that the clergy plaintiffs-respondents allege no impairment of their freedom of religious speech and exercise.

[12] While Congress may create legal "standing" by creating a statutory cause of action for private parties, it clearly has not done so in the area of administration of the tax laws. Indeed, perhaps more clearly than in most areas of federal law, Congress has expressed precisely the *opposite* intention. See, *e.g.*, 26 U.S.C. § 7421(a) (barring taxpayer suits to restrain tax assessment or collection); 26 U.S.C. § 7801(a) (specific delegation of authority to Executive Branch officials to enforce and administer tax laws). Congress plainly intended the administration of the tax code, not excluding the granting and revocation of exempt status under § 501(c)(3), to be within the discretion of the Executive Branch, not private attorneys general. There is nothing in the code or its legislative history to suggest an intention to create a statutory cause of action for the benefit of third parties like plaintiffs-respondents.

logical nexus between any of plaintiffs-respondents various assertions of injury—"denigration" and distortion of the political process—and their status as taxpayers. Whatever else the "denigration" or "distortion" injuries might be, they are certainly not injuries that harm a taxpayer *qua* taxpayer.

Plaintiffs-respondents do not and could not assert any injury to their freedom of religious exercise or nonexercise *arising from their status as taxpayers*. Rather, they assert a generalized distortion of the political process in favor of petitioners, arising from alleged nonenforcement of statutory restrictions on political activity, and injuring them in a way that has essentially nothing to do with their taxpayer status.

In sum, the "denigration" or "stigmatic" injury is insufficient to create a justiciable controversy, under *Allen* v. *Wright*; neither the "denigration" nor "distortion" allegations can provide taxpayer standing under *Flast* v. *Cohen*; and the establishment clause contains no broad-brush exception to Article III limitations on the power of federal courts to entertain lawsuits. Petitioners' challenge to the district court's Article III jurisdiction must therefore prevail under the rule of *Allen* v. *Wright*, and the judgments of the lower courts accordingly should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed, with directions that the district court dismiss the complaint.

Respectfully submitted,

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